



Federal Communications Commission
Washington, D.C. 20554

January 31, 2006

DA 06-203
In Reply Refer to:
1800B3

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Dan J. Alpert, Esq.
2120 North 21st Road
Arlington, VA 22201

In re: **DKXXA (AM) (formerly KTOD (AM)),
Conway, AR
Facility ID No. 14466**

BR-20040628ABM

Dear Mr. Alpert:

By this letter, we (1) deny Creative Media, Inc.'s ("Creative") July 6, 2005, request to reinstate the expired license of station KXXA(AM),¹ Conway, Arkansas,² and (2) dismiss Creative's pending application for renewal of license for KXXA(AM).

Background. On August 6, 2004, Creative informed the staff that station KXXA(AM) had gone off the air on May 19, 2004, and requested Special Temporary Authorization ("STA") to remain silent.³ On August 9, 2004, the staff granted Creative's request to operate KXXA(AM) with a "folded unipole" antenna at a location other than its licensed site because Creative had lost its licensed transmitter site.⁴ This letter erroneously indicated that KXXA(AM) "has been silent since June 28, 2004, and thus faces the loss of its license if it does not resume broadcasting on or before June 28, 2005."⁵ The letter was sent to Creative and its counsel. On August 23, 2004, the staff granted Creative silent STA request, indicating, correctly, that "the broadcast license for [KXXA(AM)] will automatically expire as a matter of law if

¹ Formerly KTOD(AM). The call sign was changed to KXXA(AM) on June 7, 2005.

² 47 U.S.C. § 312(g). See *Letter to Creative Media, Inc.*, Reference 1800B3-ALM (MB June 6, 2005) ("*License Expiration Letter*").

³ *Letter to Ms. Marlene Dortch from Dan J. Alpert, Esq.* (rec'd August 6, 2004). The request was supplemented at the request of the staff by letter dated August 20, 2004; in that August 20 supplement, Creative indicates that the KXXA(AM) transmitter had been relocated, but that it was "still in the process of ordering and arranging for delivery of the folded unipole specified in the STA necessary to resume operations." *Letter to Ms. Marlene Dortch from Dan J. Alpert* (Aug. 20, 2004).

⁴ *Letter to Dan J. Alpert, Esq.* (MB Aug. 9, 2004). The technical STA request was filed on July 26, 2004; the STA expired on February 9, 2005.

⁵ *Id.* at 1-2. The source of the erroneous June 28, 2004 silent date listed in the letter is unclear.

broadcast operations do not commence by 12:01 a.m. May 20, 2005.”⁶ This letter was sent to Creative’s counsel.⁷

Notwithstanding the August 9, 2004 grant of the technical STA, Creative did not recommence operation of KXXA(AM),⁸ nor did it seek additional authority to remain silent. Accordingly, on June 6, 2005, the staff issued the *License Expiration Letter*. The *License Expiration Letter* noted that, according to Commission records, KXXA(AM) had been off the air since May 19, 2004 and, unless the staff received documented evidence within 30 days that the station returned to the air between that date and 12:01 a.m. on May 20, 2005, the Commission’s data bases would be modified to reflect the expiration of the KXXA(AM) license and the deletion of its call sign. This letter was sent by Certified Mail-Return Receipt Requested to the licensee but was not served on Creative’s counsel.⁹

On July 6, 2005, Creative’s counsel filed a letter (the “Letter Response”) to the *License Expiration Letter*. The Letter Response does not contest the fact that station KXXA(AM) has been silent since May 19, 2004. Moreover, it does not provide any “documented evidence” establishing that station KXXA(AM) returned to the air prior to May 20, 2005. Rather, the Letter Response implicitly requests that the Commission exercise the discretion provided by Section 312(g) to reinstate the KXXA(AM) license. It lists the beneficial programming the station has provided to Conway residents in its 41 years of operation (high school football games, local news, city council meetings, emergency weather information). Finally it indicates that, with the relocation of Creative’s other Conway station, KASR(FM), to Vilonia, Arkansas,¹⁰ cancellation of KXXA(AM)’s license would result in Conway losing a second station and its only commercial AM station.¹¹ Creative asserts that it has spent over \$93,000 in preparing KXXA(AM) to resume operations and was “literally ready to begin final testing of KXXA(AM) when it received the [*License Expiration Letter*].”

Finally, on July 14, 2005, Creative filed a request for special temporary authorization to allow KXXA(AM) to resume broadcast operations notwithstanding the fact that the station had been silent for longer than one year. Creative based this request on the discretion accorded the Commission in the December 2004 revisions to Section 312(g) of the Act.¹² The staff granted that STA request on August 5,

⁶ *Letter to Dan J. Alpert, Esq.*, reference 1800B3-ALM (MB Aug. 23, 2005).

⁷ Notwithstanding that the letter apparently was mailed by the staff, as discussed below, Creative’s counsel claims never to have received this letter.

⁸ It did, however, seek a timely extension of the technical STA on January 28, 2005. *Letter to Marlene Dortch from Dan J. Alpert* (Jan. 28, 2005). That extension request remains pending.

⁹ Pursuant to 47 C.F.R. § 1.12, Creative’s counsel should have been served with a copy of any decision pertaining to KXXA(AM).

¹⁰ *See Conway and Vilonia, Arkansas*, 18 FCC Rcd 25634 (MB 2003). Creative filed an application to implement the rule making on May 10, 2004 (File No. BPH-20040510AAN, granted on November 9, 2004), and it recently filed a covering license application for KASR(FM). *See* File No. BLH-20050721ABN).

¹¹ Conway will retain noncommercial educational FM station KCON(AM), licensed to the University of Central Arkansas, as well as KMJX(FM), owned by Clear Channel Broadcasting Licenses, Inc.

¹² *See Satellite Home Viewer Extension and Reauthorization Act of 2004*, Publ L. 108-447, Div. J., Title IX, § 213, 118 Stat. 3431 (Dec. 8, 2004).

2005, without prejudice to whatever action, if any, the staff deemed appropriate in light of any violations uncovered in its evaluation of the record in this proceeding. That STA is set to expire 180 days from the date of grant or upon action on the pending KXXA(AM) license renewal application, whichever is sooner.¹³

Discussion. Section 312(g) of the Communications Act, 47 U.S.C. Section 312(g), provides that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary. . . ." ¹⁴ The record in this case indicates that KXXA(AM) has remained continuously off the air since May 19, 2004. Consequently, we find that KXXA(AM)'s license has expired as a matter of law.

Notwithstanding the fact that KXXA(AM) has remained silent for 12 consecutive months, the Commission retains discretion under Section 312(g) to extend or reinstate such license "to promote equity and fairness."¹⁵ The exercise of that discretion is not warranted here. Station KXXA(AM) went silent more than 18 months ago. It has remained silent despite the grant of a technical STA on August 9, 2004, to facilitate its return to the air and the grant of its request for an STA to permit it to resume operations. Creative has not explained its continued failure to resume broadcast operations. The facts in this case do not warrant reinstatement of KXXA(AM)'s license.¹⁶

Conclusion. Accordingly, the Commission's public and internal databases will be modified to indicate that the broadcast license (BR-19960614WC) for the referenced station EXPIRED as a matter of law, on May 20, 2005, and we HEREBY DELETE the station's call sign, KXXA(AM). Additionally, Creative's July 6, 2005 request to reinstate the expired KXXA(AM) license IS DENIED, and the pending KXXA(AM) license renewal application (BR-20040628ABM) IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Creative Media, Inc.

¹³ Letter to Dan J. Alpert, Esq., Reference 1800B3-MFW (MB Aug. 5, 2005).

¹⁴ See *Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16499 (1996); see also 47 C.F.R. § 73.1740(c).

¹⁵ 47 U.S.C. § 312(g). See also *Satellite Home Viewer Extension and Reauthorization Act of 2004*, Pub.L. 108-447, Div. J., Title IX, § 213, 118 Stat. 3431 (Dec. 8, 2004).

¹⁶ See, e.g., *Letter to Mr. Zacarias Serrato*, 20 FCC Rcd ____ (2005), DA 05-2919 (Nov. 4, 2005) (license reinstatement not warranted for station off the air for more than three years "essentially due to a business decision" by the licensee).